

### **REMARKS/ARGUMENTS**

Claims 6 and 8-23 are pending in this application. Claims 6 and 8-23 presently stand rejected under 35 U.S.C. §103(a). Based on the following remarks, Applicants respectfully request reconsideration and allowance of claims based on this Response, and withdrawal of all rejections.

#### **Claim Rejections Under 35 U.S.C. §103(a)**

Claims 6, 10-13, 16-17 and 20-23 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent 4,629,628 issued to Negro (hereinafter "Negro") in view of the combination of Technology of Biscuits, Crackers and Cookies (hereinafter "Technology Reference"), and of Dictionary of Food Ingredients (hereinafter "Dictionary"). Claims 8-9, 14-15, and 18-19 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Negro in view of the above stated references and further in view of Japanese Patent No. JP 05-316930 issued to Eiji Ito et al. (hereinafter "Ito"). Applicants respectfully traverse these rejections because there are no motivations to combine these references.

#### **I. Rejection of Claims 6, 10-13, 16-17 and 20-23**

The Office Action states on page 3 that Negro teaches wafer recipes with all of the ingredients recited by Applicants. Further, on page 4, the Office Action states that Negro teaches wafer compositions containing flour, water, oil, sodium bicarbonate, lecithin, and cocoa powder in the amounts recited by Applicants. Applicants respectfully traverse this rejection because Negro does not disclose or suggest at the very least lecithin and cocoa powder within the amounts recited by Applicants, and furthermore even if it were obvious to apply the Technology Reference and the Dictionary to Negro (which it is not), Negro still would not yield a wafer in Applicants' ranges and amounts.

Negro does not disclose using a cocoa powder ingredient with wafers within Applicants' range. Furthermore, the Technology Reference and the Dictionary also do not disclose or suggest using a cocoa powder ingredient with wafers in Applicants' range, as disclosed in independent claims 6, 12, and 16. Negro discloses one example

of a recipe using cocoa powder in an amount of 1.5%; however, this does not equal 2% cocoa powder, which is the lower end of Applicants' range. Also, Negro does not disclose the addition of cocoa powder to any or all ranges of the batters, as shown in Recipes I-III. There is no implication that cocoa powder could be added, without modification of the compositions, to those ranges and recipes. However, even if it did, the amount of cocoa powder used still would not be within Applicants' range.

Assuming that the ranges of the ingredients in Negro could be broadened to span from the non-cocoa powder wafer recipes to the cocoa powder wafer recipes, the range of cocoa powder given still does not equate to the range used by Applicants' wafer recipe; even if some of the other ingredients may now have broader ranges within Applicants' ranges, the overall composition still is not the same. Furthermore, cocoa powder is being used to color and add flavor to the wafer of Negro, whereas Applicants' use of cocoa powder is to create a crunchier wafer with crunchier mouthfeel during and after chewing.

The only way that the sodium bicarbonate ingredient and the vegetable oil ingredient of Negro could come close to spanning Applicants' range of those ingredients is if the ranges for non-cocoa powder wafers is combined with the range for cocoa powder wafers to then span Applicants' range, even though the recipe amounts for both vary depending on whether the cocoa powder is used or not.

As for the lecithin ingredient, Examiner states on page 4 of the Office Action that the lecithin range in Negro ranges from 0 to about 0.2%, which is incorrect; Negro has a lecithin range of 0 to 0.16% (Recipe I has a lecithin value of 0.16%, and not "about 0.20%" as stated on page 4 of the Office Action). Therefore, the lecithin range of Negro is not the same as Applicants' range of 0.2 to 0.3% contained in Applicants' wafer; 0.20% does not include 0.16%.

The Technology Reference, cited on page 5 of the Office action, is stated as teaching recipes containing lecithin in an amount of 0.3% in Recipe 4. However, the Technology Reference actually teaches lecithin in an amount of 0.38% in Recipe 4, which

is still outside Applicants' range of 0.2 to 0.3%. Furthermore, Recipe 4 has a different composition than Applicants' wafers (as do the remaining recipes shown in the Table), so even if it did teach a similar range it still would not have been obvious to apply that recipe to Negro to result in Applicants' wafer recipe. Also the last sentence of the first paragraph on page 294 of the Technology Reference states that the recipes given in Table 29.1 (which is the Table containing Recipe 4) show "a limited range of both types and quantities of ingredients in common use." Thus, implying that the range shown in the table is limited to what is shown and further broadening of that range is not taught.

The Examiner also cites a definition from the Dictionary that lecithin is used as a wetting agent for cocoa powder, implying that if lecithin is used it must be intended in combination with cocoa powder to act as a wetting agent. However, lecithin may have many other uses as well, as further indicated in the Dictionary, and just because lecithin is used is not indicative that cocoa powder must also be used. On the contrary, Negro even provides other examples (Recipes I and III) that use lecithin but do not use cocoa powder.

Therefore, it would not have been obvious to add more lecithin to Negro to obtain lecithin in Applicants' range just because the Technology Reference gives higher ranges and because the Dictionary states that lecithin may be used as a wetting agent for cocoa powder. On the contrary, the Technology Reference actually states that its ranges are limited, thus teaching away from extending lecithin ranges in wafer recipes.

Next, at page 6 of the Office Action, Examiner states that even though Negro does not specifically state the viscosity of the batter, it teaches a similar composition and thickness wafer and therefore it has the viscosity recited by Applicants in independent claim 12. As acknowledged by the Examiner, a specific viscosity value or range is nowhere stated in Negro. Furthermore, Negro does not teach a wafer with similar composition (as discussed above) and thickness as Applicants' (Negro has a thickness range of 2-5 mm per wafer layer, whereas Applicants disclose a thickness of 30 mm per wafer) and as a result it cannot be assumed that Negro discloses the same viscosity batter if it does not contain the same quantities and ingredients as Applicants' wafer batter. Even

if the composition of Negro's wafer is taken to be *similar* to Applicants' wafer, to have the same viscosity range the composition would have to be the *same*, and not just similar.

Assuming that the wafer of Negro did have the same viscosity, its composition of the wafer is still not the same as Applicants' wafer. Specifically, Negro does not contain 2-10% cocoa powder as disclosed in claim 12. Therefore, Applicants have shown that the prior art product of Negro is different, and thus does not make claim 12 obvious.

The Office Action at pages 7-8 further states that it is obvious to make wafers enrobed in chocolate, stacked, and filled, as per claims 10, 11, 16, 20, and 22-23. However, Negro does not disclose Applicants' wafer enrobed in chocolate, stacked and filled. Furthermore, neither of the other two references, the Technology Reference and the Dictionary, disclose or suggest doing so to wafers having Applicants' composition nor to do the same to Negro. Even if it was obvious to enrobe, stack and/or fill the wafer of Negro, Negro still does not disclose using cocoa powder in Applicants' range, and therefore the wafer obtained would still not be similar to Applicants'.

As to claim 21, the Office Action states that the wafer of Negro can be stacked and filled to achieve the same dimensions of Applicants' wafer, and that the Negro wafer has a size of 90mm x 25mm, which is the same length as Applicants' wafer. However, Applicants' wafer has a size of 90-92mm x 21mm, which is not the same as the Negro wafer, and furthermore, it cannot be assumed that cream fillings in the Negro wafer would have the same thickness as the wafer sheet itself to therefore comprise a finished stacked product similar in width as Applicants' wafer product. Moreover, even if enrobing, stacking, filling, and the same thickness of the wafer were also used with the wafer of Negro, the different cocoa powder amounts would make it a different wafer product than Applicants' wafer.

Therefore, for at least these reasons, Applicants respectfully submit that Negro in view of Technology of Biscuits, Crackers and Cookies and in view of Dictionary of Food Ingredients do not disclose or suggest the invention claimed in claims 6, 10-13, 16-17 and 20-23 and that it is not obvious to combine any of the two above given references with

Negro to obtain at least Applicants' cocoa range, lecithin range, or viscosity. Moreover, the independent claims 6, 12, and 16 are not obvious and as a result dependent claims 10-11, 17, and 20-23, that depend therefrom, are also not obvious and reconsideration and allowance of these claims is hereby requested.

## **II. Rejection of Claims 8-9, 14-15, and 18-19**

The Office Action states on pages 9-10 that Negro teaches wafer recipes at the lower end of 2% cocoa powder, and that in combination with the above references and Ito it would have been obvious to increase the cocoa amount in the Negro wafer to 6% as shown in Ito (which is actually 7.6%, or  $\{(660/8700)*100\}$ ). Applicants respectfully traverse this rejection because Negro does not disclose or suggest cocoa powder in the amount of 2% (as discussed above), and furthermore it is not obvious to apply the cocoa powder amounts used in making ice cream shells in Ito to the wafer of Negro in order to obtain Applicants' cocoa powder range.

The filling shell of Ito is made up of a different composition shell than either Negro or Applicants' wafer, so although it may disclose using cocoa powder within Applicants' range it has a different composition of ingredients and is made for a different purpose. Ito further does not disclose the addition of sodium bicarbonate or salt, and may or may not contain lecithin, all of which are mandatory in Applicants' wafer. Ito discloses the addition of cocoa powder, emulsifier and wheat flour and may further include oil and water.

Applicants' wafer deals with wafer-based confectionary products comprising at least two outer wafer layers, and forming a wafer composition further disclosed as comprising cocoa powder, flour, salt, vegetable oil, lecithin, sodium bicarbonate and water. Ito's shell composition is an outer shell having only one layer for holding ice cream; the shell is not a wafer composition of at least two outer layers as defined by Applicants' invention nor comprising the same ingredients, therefore it would not have been obvious to combine it with a wafer of Negro (which also requires a wafer product of at least two or more wafer sheets, see claim 1 of Negro).

Additionally, the filling shell of Ito is used in a different manner than either Applicants' or Negro's wafer, where the shell is being used to store ice cream in a frozen state. The filling shell is stored in a frozen state until use, whereas Applicants' wafer is normally stored at about room temperature. Therefore, the result of little moisture absorption within the shell of Ito may be due to the temperature at which the shell is stored instead of or in addition to the cocoa powder amounts.

Ito does not disclose a similar composition wafer with cocoa powder; rather Ito discloses an ice cream shell with cocoa powder that furthermore is stored in a frozen state until use. There are many food products that exist that also contain cocoa powder and may even use cocoa powder in Applicants' range, however, that does not make them obvious to try with a wafer product. Food products that are not wafer products do not provide a motivation to combine with the Negro wafer, just as there is no motivation to combine the ice cream shell of Ito with the Negro wafer.

Even if Ito's shell did consist of similar ingredients, the shell is stored in a frozen state which may aid in preventing moisture and humidity in the surroundings of the shell, and may play a large part in aiding prevention of moisture migration. The different use/storage of Ito makes it different from the way Applicants' wafer and Negro's wafer is stored and used, so different that there would not be any motivation to combine it with Negro.

Therefore, for at least these reasons, Applicants respectfully submit that Negro in view of Technology of Biscuits, Crackers and Cookies, in view of Dictionary of Food Ingredients, and further in view of Ito do not disclose or suggest the invention claimed in claims 8-9, 14-15, and 18-19 and that it is not obvious to combine Ito or any of the two above given references with Negro to obtain Applicants' cocoa range and properties. Moreover, claims 8-9, 14-15, and 18-19 are not obvious and reconsideration and allowance of these claims is hereby requested.

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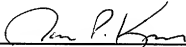
**CONCLUSION**

In view of the foregoing, Applicants submit that claims 6 and 8-23 are patentable over the cited references and hereby respectfully request reconsideration and allowance of claims 6 and 8-23. The Commissioner is hereby authorized to charge any additional fees which may be required in this matter, or to credit any overpayment, to Deposit Account No. 06-1135.

Respectfully submitted,

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